

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL'S
MOTION FOR SUMMARY JUDGMENT
ON LIABILITY OF QWEST
CORPORATION FOR DAMAGES

I. INTRODUCTION

The Northwest Public Communications Council ("NPCC"),¹ moves for summary judgment on liability only pursuant to NPCC's claim that Qwest owes NPCC's members a refund for payphone access line ("PAL") overcharges under applicable Federal law.² The claim arises from an April 1997 FCC order requiring Qwest to pay refunds based on the difference between its 1997 rates and new rates that the FCC ordered Qwest to file pursuant to the new services test ("NST"). The delay between the 1997 order and now (the "Refund Period") has been occasioned by the lengthy and somewhat tortured process of obtaining a final determination

¹ The NPCC was formerly known as the Northwest Payphone Association ("NWP"), and some OPUC orders relevant to this case refer to NPCC as the NWP.

² NPCC's complaint also covers CustomNet screening services. That portion of the claim is not included in this motion because the PUC still needs to determine the NST-compliant rate in UT 125 on remand from the Oregon Court of Appeals.

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL'S
MOTION FOR SUMMARY JUDGMENT ON LIABILITY OF
QWEST CORPORATION FOR DAMAGES - 1

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of NST-compliant rates in OPUC Docket UT 125.³ That docket—now almost ten years old—may be close to final resolution. Upon such resolution, the amount of refunds, or “damages,” can be determined. However, at this time there are no material facts that can be legitimately disputed regarding Qwest’s liability for the refunds.

The relevant federal law⁴ and undisputed material facts are clear. Specifically: (1) the FCC required Qwest to have in effect state payphone services tariffs by April 15, 1997 that complied with the NST, (2) the FCC granted Qwest a waiver of that requirement in exchange for Qwest’s agreement to refund the difference by which its new, NST-compliant rates (when effective) exceeded the old rates, (3) Qwest took advantage of the waiver, (4) Qwest did not have NST-compliant tariffs in effect in Oregon from 1996 through at least 2003,⁵ (5) NPCC’s members purchased PAL services from Qwest at various times during the Refund Period, and (6) Qwest has never paid a refund of its overcharges to NPCC’s members under the Waiver Order.

Based on the undisputed facts and applicable Federal law, Qwest should be ordered to pay NPCC’s members refunds in amounts to be determined later. Until Qwest pays

³ UT 125 was commenced in 1995. The case went up on appeal twice, first on revenue requirements, and then on the PAL rate portion of rate design. The second appeal was decided by the Court of Appeals on November 10, 2004, reversing the Commission. An NST-compliant rate will presumably be determined on remand in 2005, about eight years after Qwest was originally to have complied with the NST requirement.

⁴ Federal law governs pursuant to Congressional and FCC preemption. See 47 U.S.C. § 276(c); Order on Reconsideration, FCC Rcd 21,233 at ¶ 163 (“Order on Reconsideration”); NPCC v. OPUC, Case No. 119640 at 1 (Nov. 10, 2004) (“NPCC v. OPUC”).

⁵ Qwest’s PAL rate was subject to litigation in the OPUC’s Docket UT 125 from at least 1996 on. In late 2001, the OPUC approved Qwest’s proposed rate of \$26 as complying with the NST in its final order on rate design in UT 125. However, the Court of Appeals reversed the OPUC’s finding of NST compliance on November 10, 2004, holding that the OPUC did not properly apply federal law in reviewing Qwest’s PAL rates. In March 2003, Qwest slashed its Oregon PAL rates more than in half. While these rates may be confirmed by the Commission as being in compliance with the NST, the exact and final compliant rate will not be known until the OPUC acts in UT 125 on remand. That is why this motion seeks judgment only on liability and not the amount of refunds.

the refunds it owes, it retains a windfall it does not deserve. That windfall belongs to PAL customers, who have been overcharged by Qwest for at least six years of the Refund Period.

II. BACKGROUND

NPCC is a trade association of payphone service providers (“PSPs”). NPCC’s members⁶ purchase “Basic” PALs from Qwest. Basic PALs are ordinary switched access lines that connect payphones to the public switched network.

Qwest has overcharged NPCC’s members during the Refund Period because it has not had effective PAL rates that complied with the NST, which is the FCC’s rate-setting methodology for payphone services. It is not essential for the OPUC to determine the appropriate level that Qwest’s rates must be under the NST in order to rule on this motion,⁷ but NPCC is providing some background on the NST’s requirements as context. For illustrative purposes, the Declaration of Randy Linderman, filed herewith as Exhibit 1, attaches bills from one of his Oregon payphones from 1996 through 2003. The bill went from \$69⁸ in 1996, to \$34.77 in 1998, to \$26 by 2002 under the PUC’s order in UT 125, and to \$8.78 today. Linderman Dec., ¶ 5. Assuming today’s PAL rate of \$8.78 is approved as NST-compliant in UT 125, Qwest’s overcharges during the Refund Period ranged from well over 100% to over 700% of the lawful rate that the FCC mandated in 1996.⁹

Under the NST, Qwest’s payphone rates must be cost-based. New England Public Communications Counsel v. FCC, 334 F.3d 69, 71 (D.C. Cir. 2003); Memorandum of

⁶ When NPCC refers to its “members” in this proceeding, it means those members that purchase PAL service from Qwest in Oregon between April 15, 1997 and now.

⁷ As noted, the rate will be determined in UT 125.

⁸ Based on a sample bill, for the line, EAS, and usage, but excluding EUCL, taxes and similar fees. At that time, Qwest did not offer flat-rated PAL service. Linderman Decl., ¶ 5.

⁹ The numbers are for illustrative purposes only. The NPCC does not seek a determination of the amount of overcharges or refunds at this time—only a finding of liability.

Opinion and Order, 17 FCC Rcd 2051 at ¶ 23 (2002) (“New Services Order”); Order, 15 FCC Rcd 9978 at ¶ 9 (2000) (“Wisconsin Order”); Order on Reconsideration at ¶ 163; see 47 U.S.C. § 276(d). The NST requires Qwest to file tariffs containing cost-based rates and supporting cost data with state commissions, including the OPUC, proving that Qwest’s tariffed payphone services rates comply with the NST. New Services Order at ¶ 56; Order, FCC Rcd 21,370 at ¶ 25 (1997) (“April 15th Waiver Order”). The FCC directed state commissions like the OPUC to implement the NST according to FCC-established parameters and to ensure that Qwest’s PAL rates meet the federal test. Order on Reconsideration at ¶ 163. The FCC required Qwest to have effective, NST-compliant rates in place by April 15, 1997. Id.

To force Qwest to comply with applicable federal law, NPCC participated in the OPUC’s Docket UT 125, which was the general rate case commenced in 1995 to examine all of Qwest’s rates (“Rate Case”). See Complaint at p. 7. The NPCC also filed a Complaint on May 11, 2001 (“Complaint”) that led to this proceeding (“Refund Case”), which alleged that Qwest owed NPCC’s members a refund for payphone services rates that exceeded the legal limit under the NST during the Refund Period. Id. NPCC’s Complaint requested the OPUC to order Qwest to refund those overcharges to NPCC’s members. Id. at p. 7. The OPUC stayed the Refund Case while the Rate Case was proceeding, at the request of NPCC and Qwest. Ruling, OPUC Docket No. UT 600, DR 26 (June 21, 2001).

The OPUC entered its final order in the Rate Case on September 4, 2001 by approving PAL rates for Qwest that were substantially lower than those that Qwest had previously charged but higher than those for which NPCC advocated. Order No. 01-810, Docket UT 125 (Sept. 14, 2001) (“Final Order”). NPCC sought reconsideration, which the OPUC denied. Order No. 02-009, Docket No. UT 125 (Jan. 8, 2002) (“Reconsideration Order”).

Although this case could have proceeded based on the rate reductions approved in the Final Order, the OPUC surprised NPCC on March 22, 2002, by dismissing NPCC’s Refund Case Complaint without notice or hearing, apparently based on a misunderstanding about the

relief NPCC sought. Order, OPUC Docket UT 600 at 1 (Mar. 21, 2001). NPCC appealed the OPUC's dismissal to the Marion County Circuit Court, which effectively remanded this case. The Court directed the OPUC on remand to "take additional evidence as set forth in ORS 756.600" and to "entertain[] such evidence, briefing, and argument as may be required by law or as the OPUC may find appropriate. . . ." Order Granting Plaintiffs' Motion, Oregon Circuit Court for Marion County, Case No. 02C14442 at 2 (2004), attached as Exhibit 2.

NPCC now moves for summary judgment on the issue of whether Qwest is liable for refunds for its PAL overcharges during the Refund Period. It is appropriate for the OPUC to consider these issues now, because the Oregon Court of Appeals just reversed the OPUC's approval of Qwest's PAL rates and the case is back before the OPUC. See NPCC v. OPUC at 1. Thus, a final NST-compliant rate could be set in early 2005, allowing the Commission to calculate the amount of the refunds to which NPCC's members are entitled.

III. DISCUSSION AND ANALYSIS

A. Standards for summary judgment.

The OPUC must grant summary judgment if NPCC's motion shows that there is no genuine issue as to any material fact:

The [OPUC] shall enter [summary] judgment for the moving party if the pleadings, depositions, affidavits, declarations and admissions on file show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

ORCP 47(c). There is no issue of material fact where no "objectively reasonable juror could return a verdict for" Qwest:

No genuine issue as to a material fact exists if, based upon the record before the [OPUC] viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at trial. . . . A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages

ORCP 47(c).¹⁰ As explained below, there is no genuine issue of material fact regarding Qwest's liability. The indisputable facts show that Qwest charged NPCC's members payphone services rates in excess of the NST limits and thus must refund the overcharges.

B. The FCC required Qwest to have in effect state payphone services tariffs by April 15, 1997 that complied with the NST.

The FCC in 1996 required RBOCs, to have effective, NST-compliant tariffs in place by April 15, 1997:¹¹

As required in the Report and Order, and affirmed herein, all required tariffs, both intrastate and interstate, must be filed no later than January 15, 1997 and must be effective no later than April 15, 1997. Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the Report and Order, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the Report and Order as revised herein; and 2) that in such case no further filings are required.

Order on Reconsideration at ¶ 163 (emphasis added). Qwest is an RBOC, so Qwest had to have effective NST-compliant payphone services tariffs by April 15, 1997. Indeed, Qwest's predecessor, U S WEST, as a member of the "RBOC Coalition," agreed that payphone services must meet the NST and that "ensuring that previously tariffed payphone services meet the [NST] . . . should not be too problematic." Order, 12 FCC Rcd 21,370 at ¶ 14 (1997) ("April 15th Waiver Order"). The law regarding NST compliance is clear.

C. The FCC granted Qwest a waiver of the tariffing requirement in exchange for Qwest's agreement to refund the difference by which its new, NST-compliant rates (when effective) exceeded the old rates.

Qwest apparently believed that it would be unable to meet the FCC's April 15, 1997 deadline, because Qwest, as a member of the RBOC Coalition,¹² asked the FCC for a waiver of the requirement to file NST-compliant rates. On April 10, 1997, the RBOC Coalition (including Qwest) asked the FCC to grant a waiver of the duty to file NST-compliant payphone

¹⁰ Oregon Rules of Civil Procedure govern the standard for summary judgment, as the OPUC rules contain no specific rule on summary judgment. See OAR 860-011-0000(3).

¹¹ Originally, the FCC applied the NST to all ILECs. Later it was applied only to RBOCs.

¹² Qwest was part of the "RBOC Coalition." See April 15th Waiver Order at ¶ 3, n.7.

services tariffs with state commissions. April 15th Waiver Order at ¶ 13. In exchange for the waiver, Qwest “voluntarily committ[ed]” to “reimburse or provide credit to those purchasing the services back to April 15, 1997 . . . to the extent that the new tariff rates are lower than the existing ones.” Id. at ¶ 14.

The FCC granted Qwest’s request for the 45-day tariff filing waiver but required that if Qwest relied on the waiver, it must pay refunds for any overcharges assessed against payphone service provider customers for the period when Qwest’s rates exceeded the NST-allowable amounts:

A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.

April 15th Waiver Order at ¶ 25 (emphasis added). The FCC placed no specific expiration date on Qwest’s duty to pay refunds. Rather, Qwest’s obligation to pay refunds ran from April 15, 1997 until it had “effective,” NST-compliant rates approved by the state commissions, however long that took. Id. As Qwest’s request for the waiver and the FCC’s order recognized—and the Rate Case so well illustrates—getting NST-compliant rates approved by state commissions can take a lot longer than 45 days. By imposing the open-ended refund requirement, the FCC prevented Qwest from reaping an unfair windfall by maintaining tariffed rates that exceeded the NST limits until state commissions could approve NST-compliant tariffs years later.

The law requiring refunds from the April 15, 1997 deadline until Qwest’s ultimate compliance with the NST is also clear.

D. Qwest took advantage of the waiver.

Two facts that are beyond reasonable dispute prove that Qwest relied on the FCC’s waiver. First, Qwest began to collect “dial around compensation” on or about April 15, 1997. Dial-around compensation is what long distance companies must pay BOCs when those long distance companies carry toll-free calls that originate from payphones. The significance of

this development is that the FCC required BOCs to have in effect NST-compliant PAL rates before they began to collect dial-around compensation from long distance companies.

In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding.

April 15th Waiver Order, at ¶ 10. But Qwest wanted a waiver of the NST filing requirement so that it could start collecting dial around compensation on April 15, 1997, before filing NST rates:

The RBOC Coalition argues that this 45-day period would allow the LECs to file new intrastate tariffs in the states where it is necessary without delaying its eligibility to receive compensation.

Id. at ¶ 14. The FCC granted the 45 day waiver, and Qwest began collecting dial around compensation before it filed NST-compliant tariffs. See Fifth Supplemental Order, 1999 Wash. LEXIS 122 at *4 (WUTC 1999). In doing so, Qwest relied on the NST filing requirement waiver.

Second, Qwest has not had an approved NST-compliant rate in effect in Oregon during the Refund Period. Indeed, it does not have an approved compliant rate even today. Rather, the question of the lawfulness of Qwest's PAL rates under the FCC-mandated NST has been in continuous litigation since 1996. The closest Qwest came to getting an approved rate was in late 2001, when the PUC approved a substantially reduced PAL rate of \$26. But that order was just overturned by the Court of appeals because Qwest misled the Commission on how to apply the NST. See NPCC v. OPUC at 1.

The PAL rate today is \$8.78. If that rate is approved as NST-compliant on remand in UT 125, then Qwest will have finally fulfilled its 1997 obligation to secure state approval for its PAL rates. Moreover, the "when effective" language in the Waiver Order will finally be triggered, permitting calculation of the refunds Qwest owes for the last 6 or 7 years of overcharges.

E. Qwest did not have NST-compliant tariffs in effect in Oregon from 1996 through at least 2003.

Although Qwest took advantage of the waiver beginning on April 15, 1997, it did not file NST-compliant tariffs. Instead Qwest took advantage of its then-pending general rate case, Docket UT 125, to address its PAL rates. While it is doubtful even Qwest wanted to delay resolution of PAL rates for seven years, that is what has happened in the Rate Case. In fact, Qwest still has no effective NST-compliant tariffs lawfully approved by the OPUC, as a matter of law. That is because the Oregon Court of Appeals on November 10, 2004 overturned the OPUC's holding in the Rate Case that Qwest's PAL rates meet the NST. NPCC v. OPUC at 6.

Absent a refund order, the extraordinary delay works greatly to Qwest's benefit. Qwest's PAL rates were, at various time from 1997, *two to seven times* higher than they should have been. The FCC recognized that state rate cases sometimes move slowly, which is why the FCC imposed the refund requirement on Qwest, triggered by the NST-compliant rates, "when effective." Hopefully that long anticipated effectiveness will occur in Oregon very soon, allowing computation of the required refunds.

F. NPCC's members purchased PAL services from Qwest at various times during the Refund Period.

The NPCC members who ordered payphone services during the Refund Period are listed in the attached declaration. Linderman Decl., ¶ 4. Qwest, through its billing records, and NPCC, can provide precise line counts and dates of service for those members when it becomes relevant to determining their damages. While such line counts and the rates paid varied from time to time, there is no dispute that NPCC members purchased PALs from Qwest during the Refund Period. Thus, as a matter of law, they are entitled to refunds.

G. Qwest has never paid a refund of its overcharges to NPCC's members under the Waiver Order.

As explained above, Qwest relied on the 45-day waiver but never filed NST-compliant rates. Likewise, although Qwest has reduced its rates drastically several times

during the Refund Period and is now presumably close to having an NST-compliant PAL rate in Oregon, Qwest has never paid any refunds under the Waiver Order, as it is required to do.¹³ Linderman Decl., ¶ 6.

H. As a number of state commissions have recognized, refunds are required in these circumstances so Qwest does not receive a windfall for its years of non-compliance with Federal law on PAL pricing.

Qwest must now refund to NPCC's members the difference between the old, pre-NST payphone services rates and the new, NST-compliant rates once those are on file with the OPUC, whenever that may occur. See April 15th Waiver Order at ¶ 25. By doing so the OPUC would be acting consistently with many other public utility commissions ruling that RBOCs like Qwest must pay refunds to payphone services providers. These commissions include the Michigan Public Service Commission,¹⁴ the Tennessee Regulatory Authority,¹⁵ the Kentucky Public Service Commission,¹⁶ the South Carolina Public Services Commission,¹⁷ the Louisiana Public Service Commission,¹⁸ and the Pennsylvania Public Utility Commission.¹⁹

Fundamental fairness, in addition to the law articulated above, also requires Qwest to pay refunds for overcharges to NPCC's members. It is unjust and contrary to public policy for Qwest to retain years of overcharges illegally collected from NPCC's members.

¹³ In response, Qwest may argue that it paid a refund pursuant to a stipulation and order in Docket UT 125. That refund was based on state law, however. It fell far short of the applicable federal requirements of the Waiver Order for several reasons. Among others, the UT 125 refund only covered a portion of the Refund Period. Moreover, the UT 125 refund was based on 1FB rates and did not take into account the much greater rate reductions that Qwest has been required to make in PAL rates to comply with the NST.

¹⁴ Order, 2004 Mich. PSC LEXIS 65 at **41, 42.

¹⁵ Interim Order, 2001 Tenn. PUC LEXIS 74 at **48, 49; adopted by the TRA in relevant part and upheld on appeal, Bell South v. TRA, 98 S.W.2d 666, 667 (Tenn. Ct. App. 2002).

¹⁶ Administrative Case No. 361 at 3 (2003).

¹⁷ Order No. 1999-284, Docket No. 97-124-C at 28, 29 (1999).

¹⁸ Order, 2004 La. PUC LEXIS 181 at **3, 4.

¹⁹ Docket No. R-0097386700001. The Commission approved the terms of a stipulated agreement wherein Bell Atlantic– Pennsylvania would establish new rates for payphone access services and provide a refund dating back to April 15, 1997.

Qwest refused at its own peril to file NST-compliant rates for many years. It then misled the OPUC during the Rate Case about the proper application of the NST, thus leading to the Oregon Court of Appeals reversal of the OPUC's Final Order in that case.

IV. CONCLUSION AND REQUEST FOR RELIEF

The issues NPCC raises are ideally suited for summary judgment. As shown above, Qwest's duty to pay refunds is clear under federal law, and the OPUC does not need to make any findings of fact that are not already incorporated into FCC or OPUC orders. Moreover, at this time the OPUC needs only to decide that Qwest is liable to NPCC's members for a refund. NPCC does not ask the OPUC to determine the proper NST-compliant rate now, as the OPUC will do that in the companion Rate Case. Nor does the NPCC ask the OPUC to determine the amounts of the refunds, because that will be easy to determine at the conclusion of the Rate Case.

For the foregoing reasons, the OPUC should hold that Qwest is liable to pay refunds to NPCC's members for the difference between Qwest's new, NST-compliant PAL rates, once the OPUC approves those, and the rates that were actually paid during the Refund Period.

DATED this 29th day of November, 2004.

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